

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
COOK, : 15-cv-06559-ILG-CLP
 Plaintiffs, :
 :
 - versus - : U.S. Courthouse
 : Central Islip, New York
 :
CITY OF NEW YORK, et al., : October 14, 2016
 Defendants :
-----X

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE CHERYL L. POLLAK
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:

For the Plaintiff:

Ryan Michael Lozar, Esq.
The Law Office of
Ryan Lozar
305 Broadway, 10th Floor
New York, NY 10007

For the Defendant:

John L. Garcia, Esq.
Genevieve Nelson, Esq.
New York City Law Department
100 Church Street
New York, NY 10007

Transcription Service:

Transcriptions Plus II, Inc.
61 Beatrice Avenue
West Islip, New York 11795
laFerrara44@gmail.com

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1 THE CLERK: This is the matter of Cook v. City
2 of New York, case number 15-cv-6559, Civil Cause for Oral
3 Argument.

4 Counsel, please state your appearances for the
5 record.

6 MR. LOZAR: Good morning.

7 It's Ryan Lozar for plaintiffs Darlene Cook and
8 Shaqueena Cook.

9 THE COURT: Good morning.

10 MR. GARCIA: Good morning, your Honor.

11 John Garcia on behalf of the defendants.

12 MS. NELSON: And Genevieve Nelson also on
13 behalf of the defendants.

14 Good morning.

15 THE COURT: Good morning. You may be seated.

16 All right. So, I've received your papers on
17 connection with the plaintiff's motion to amend the
18 complaint. Maybe since it's your motion, you want to go
19 first?

20 MR. LOZAR: Oh, yes, your Honor. Thank you.
21 Do you prefer that --

22 THE COURT: You can sit because it's actually
23 better --

24 MR. LOZAR: Oh, for the recording.

25 THE COURT: -- for the recording, yeah.

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1 MR. LOZAR: Okay. Thank you.

2 Your Honor, so we're here today as you
3 mentioned on the motion to amend. This motion to amend,
4 it adds to defendants to the complaint. Those defendants
5 -- their names are ACS child protective specialist
6 Sarissa Wright (ph.) and ACS child protective specialist
7 supervisor Sasha Dawson (ph.). And Ms. Dawson is Ms.
8 Wright's supervisor for the purposes of all the
9 allegations that we're discussing today.

10 These two individuals came in -- they've
11 actually been discussed in the context of this case for
12 quite some time between the parties' counsel, as well as
13 with the Court. This started out as a pure false arrest
14 action that was brought by Ms. Cook, Darlene Cook and as
15 we were exploring this, she was arrested in the context
16 of ACS' and NYPD's emergency removal of children from
17 this home at 97-28 Kings Highway.

18 And as we've discussed -- and as we started to
19 discuss the facts, the underpinning Darlene Cook's
20 claims, it soon became very clear that the ACS matter was
21 part and parcel of our study. And by that I mean that an
22 OGA offense, you can only obstruct governmental
23 administration and perfect so to speak, a criminal
24 offense under that New York Penal Law if there actually
25 is an official function that's being performed at that

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1 moment.

2 And so, in making inquiry about what sort of
3 official function ACS was actually performing in that
4 moment, I got in touch with Shaqueena Cook and as your
5 Honor knows from being present for this part, Shaqueena
6 Cook, she also became a plaintiff in this case by virtue
7 of that inquiry.

8 Now when Shaqueena Cook, she came into the
9 case, you know, even still the subject was under study as
10 to what sort of official function was ACS executing that
11 day and in order to fully understand that because
12 obviously Ms. Cook's -- Shaqueena Cook's -- I'm just
13 going to say their full names to not be confusing --
14 Shaqueena Cook's impression was that there was no
15 emergency circumstance that would have justified the
16 children's removal from 97-28 Kings Highway that day.

17 And so, the parties are put in the position
18 where we needed to see the ACS records to better
19 understand this beyond Shaqueena Cook's opinion and on
20 the eve of the June 6th conference with the Court -- I
21 don't know if I got the date exactly right but it was an
22 early June conference with the Court, the day before I
23 received nine or ten pages of ACS records and I read from
24 excerpts of those ACS records to the Court during that
25 conference and it seemed very much to me that they only

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1 added further questions as to what sort of emergency
2 circumstances existed on that day.

3 And so, in light of that fact, the Court
4 ordered the production of additional ACS records to shed
5 even more light on the subject, as well as family court
6 records, so that we could review those nine single pages
7 which to my view actually seemed very bad for the
8 defendants. So, we have a fairer picture of everything.

9 And in that same conference, I discussed with
10 the Court and with my adversary that for the time being
11 pending the production of those records, I wasn't going
12 to make any motion to bring in the ACS defendants because
13 I wanted any amendment to that effect to be brought in
14 good faith. And so, I wanted a greater universe of
15 knowledge of information before I made that motion.

16 And so, the thing that we're here today is that
17 it is that motion. It's the product of the productions
18 that came in the aftermath of that conference.

19 To be honest, as the Court have it, you know,
20 all the records that have been produced to date from ACS,
21 we still haven't gotten any family court records but all
22 the records that have been produced from ACS to date,
23 they really don't do -- I mean really, like the nine
24 pages are something that like, you know, are of primary
25 interest to me because all of the rest of the production

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1 that's happened since then, it's -- they're kind of
2 bookends but doesn't explain the nine confusing pages
3 very well.

4 In any event, so, you know, what we hoped might
5 edify us further actually kind of just leaves us with
6 like the nine pages which I think makes a really good
7 claim for Darlene and Shaqueena Cook both.

8 And so where does that leave us? So, I make
9 this motion to amend the complaint which with respect to
10 the NYPD defendants, it really doesn't alter the equation
11 very much. The NYPD defendants, you know, leafing
12 through the pleading, we could talk about it with
13 specificity if your Honor would like, it will all sound
14 very familiar to you.

15 The only thing is that the ACS defendants are
16 rotated in on some of these claims. Things that are new
17 in terms of claims, there's a due process claim that
18 Shaqueena Cook is bringing against the ACS defendants
19 that is not a claim that belongs to Darlene Cook.
20 Shaqueena Cook, she is bringing that against the ACS
21 defendants for -- there's ample case law and in thinking
22 about this claim, you know, there's like this triumvirate
23 of Second Circuit cases, Sutherland, Tannenbaum and
24 Wilkinson (ph.), that talk about when emergency
25 circumstances exist and the various things that are

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1 required for a claim under this like this, too to lie.

2 But here, basically the damages that Shaqueena
3 Cook would seek under this due process claim, they would
4 cover a relatively brief period of time, a matter of days
5 and I say that because eventually there was a post-
6 deprivation hearing and it's my understanding from the
7 case law that once that post-deprivation hearing occurs,
8 the -- any damages that stem from the emergency
9 circumstances, removal, is cut off. So, that's really
10 like the brief block of time that we're talking about and
11 that's why the family court records are very important
12 because I don't really know what happened on that day.

13 I've done like a parallel pursuit with Mr.
14 Garcia for family court records from Shaqueena Cook's
15 counsel, and we could talk about that later, but both of
16 our efforts to date have not yielded the family court
17 records and that's --

18 Another --

19 THE COURT: What --

20 MR. LOZAR: Sorry.

21 THE COURT: -- what was it that you did to try
22 to get the family court records?

23 MR. LOZAR: So, I wrote to Shaqueena Cook's
24 family court attorney and he contacted me and said he
25 needed a consent form. I obtained the consent form from

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1 Shaqueena Cook. I sent it to him. He contacted me again
2 and said, "Actually there are no records," and I said,
3 "How could that be? Because this is a case that's been
4 going on for a very long time."

5 He -- well, in sum and substance he said that I
6 don't know how to litigate discovery matters and that I
7 should make a motion with the Court to get it from the
8 government. And so, it was little bit of like
9 strangeness because I don't know why he asked me to
10 execute the consent in the first place and I've
11 considered what sort of relief I might seek from the
12 Court to compel him to produce them but -- anyway, in
13 brief, that's the story, so far.

14 THE COURT: So -- okay. And --

15 MR. LOZAR: And I understand that --

16 THE COURT: But you made a request to
17 defendant's counsel, as well? Is that what I heard you
18 say?

19 MR. LOZAR: Yes, and so -- actually, I think it
20 was the date of the conference because I mean, the June
21 conference when I was with -- when we were with the Court
22 before, the Cooks were actually here, although you might
23 remember they arrived moments too late to actually be
24 with us at the conference. I spoke with Shaqueena Cook
25 that day, she executed a release. She came to my office

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1 and executed the release. And so since June, that
2 release has been with defendants and that's a pending
3 matter, an appointment for me to go and look at the
4 records which -- it's not a matter of like setting the
5 appointment. I don't think the records are there yet.

6 THE COURT: Okay. Well, let me just clarify
7 that point and then we'll go back to your argument
8 because this is a discovery issue that I would like to,
9 you know -- I mean, obviously these records are
10 important. We should get them.

11 So, did you receive the release or consent or
12 whatever it is he sent and where are we in the process of
13 getting family court records?

14 MR. GARCIA: So, your Honor, we have received
15 the release from plaintiff for the record. We've made
16 multiple requests to the family court for the records.
17 We have not receive them yet. We have even tried to go
18 through the ACS's legal department for the records and to
19 no avail. We still do not have the records.

20 THE COURT: Okay. So, somebody bring me a
21 subpoena, okay, along with the release and I'll so-order
22 it. I mean, we can't -- how long ago did you make the
23 request?

24 MR. GARCIA: I think our latest request was in
25 August, your Honor and we will take care of the subpoena

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1 to get these records.

2 THE COURT: Okay. I appreciate that. So, if
3 you will get me a subpoena. All right. So, that takes
4 care of that. We're going to get these records, one way
5 or the others because I agree with you that they may be
6 relevant for both sides.

7 MR. GARCIA: Right.

8 THE COURT: You know, we have to know what
9 happened. Okay. So, go ahead. I'm sorry.

10 MR. LOZAR: okay.

11 THE COURT: You were talking about the new
12 claim, due process violation brought against ACS by
13 Shaqueena.

14 MR. LOZAR: Yes.

15 THE COURT: What else?

16 MR. LOZAR: And so -- should we move on from
17 that claim and talk about the other -- I mean, I could
18 discuss that more if you have any questions.

19 The unlawful search claim is added. That is a
20 new claim that is against the ACS defendants alone. And
21 that is only brought by Darlene Cook. That claim is
22 founded on the fact that (one), the emergency removal was
23 effected at 97 -- not 97-28 Kings. The NYPD and possibly
24 ACS defendants but certainly NYPD went into 97-28 Kings
25 over Darlene Cook's objection to effect the emergency

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1 removal of the children.

2 And the plaintiffs -- Darlene Cook's argument
3 with respect to that claim is that the Fourth Amendment
4 does bind all government agencies -- case law, it does
5 recognize that certain agencies might have special needs
6 exception. There is no general special needs exception
7 for ACS. Certain circumstances might merit unique
8 considerations about how the Fourth Amendment binds them
9 in certain contexts but here Darlene Cook's argument is
10 that no such special needs existed because there were no
11 exigent circumstances in the first place.

12 THE COURT: So, the illegal search is the
13 search for the children? Is that what we're talking
14 about?

15 MR. LOZAR: Well, actually I should say
16 unlawful entry rather than unlawful search. I should say
17 that.

18 THE COURT: Okay. That makes more sense to me.

19 MR. LOZAR: And it has been established through
20 discovery. Your Honor may remember that very early on we
21 talked about the fact that this is a shelter -- well,
22 it's a -- it's one of these like apartments in the
23 Department of Homeless Services where -- it's an
24 apartment that someone lives in. It's a private
25 apartment that is managed by the Department of Homeless

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1 Services and so there was some question as to whether or
2 not she signed away her constitutional rights or some
3 modification of them by virtue of being there. There
4 have been DHS records produced. I've gone through them
5 all. And to my view, there's nothing to that effect.

6 THE COURT: So, your argument on the lawful
7 entry is that the ACS workers who were there to take the
8 children had no right to enter the apartment.

9 MR. LOZAR: Right, for the --

10 THE COURT: Right? That's the idea?

11 MR. LOZAR: Exactly. So, the fact that they
12 had no justification to actually seize the children, they
13 had no right to enter the apartment to seize the
14 children.

15 THE COURT: I see.

16 MR. LOZAR: But they both constituted -- well,
17 the seizure of the children, that's a Fourth Amendment
18 violation of the children's, from what I -- that's how
19 understand the law, whereas the -- whereas that affected
20 due process violation for Shaqueena Cook, right -- the
21 separation of the family is the due process issue for
22 Shaqueena Cook. It's a violation of the children's
23 Fourth Amendment rights.

24 THE COURT: Okay.

25 MR. LOZAR: But with respect to the entry into

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1 Darlene Cook's apartment, that is a violation of Darlene
2 Cook's Fourth Amendment rights. That's what we're
3 alleging.

4 THE COURT: Okay. And the children are not
5 suing in this case, right?

6 MR. LOZAR: They are not, no.

7 THE COURT: Okay. Go ahead.

8 MR. LOZAR: Let's see. And so, you know,
9 that's -- those are the most substantive things that have
10 been added -- you know, I will discuss though I mean, the
11 pre-existing false arrest claim, you know, those things
12 have become somewhat more complicated here. It's only --
13 it's somewhat more complicated and we've talked about
14 this I think in the phone conference that sort of teed up
15 this motion to amend, that is there some sort of conflict
16 here between the NYPD and the ACS defendants.

17 So, since we all had that conversation
18 together, I took great pains when I crafted the complaint
19 and hopefully it's clear in the fact section which is
20 paragraphs 15 through 50, that I understood that the NYPD
21 defendants in some respects here sounds an awful lot like
22 these warrant situations, right, where -- so ACS
23 defendants represents to the NYPD defendants that there
24 is in fact emergency circumstances -- there are, in fact,
25 emergency circumstances to remove these children and so,

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1 you know, the NYPD defendants, like they have no other
2 reason to believe otherwise, right?

3 And so, I guess the question becomes, you know,
4 well, why then are they here at all? And the plaintiff's
5 answer to that is the way this originally looked, even
6 without the ACS defendants is the plaintiffs don't think
7 that they did anything that would -- even if there was a
8 legitimate official function, even supposing there were
9 emergency circumstances, that what happened there that
10 day did not constitute the kind of physical interference
11 that the penal law -- New York Penal Law contemplates in
12 the elements of GA. And so, that is why the NYPD
13 defendants are still here.

14 THE COURT: Okay. All right. Well, let me
15 hear from defendants and then depending on what they say,
16 I may come back with more questions for you.

17 MR. LOZAR: Okay.

18 THE COURT: So, go ahead.

19 MR. GARCIA: Yes, your Honor. Good morning and
20 may it please the Court, the Court should deny the
21 plaintiff's motion for leave to amend for two reasons.
22 First, plaintiff's amendments are prejudicial and second,
23 plaintiff's proposed new claims are not bible, thereby
24 making any amendment futile. First, plaintiff's
25 amendments are prejudicial to not only the existing NYPD

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1 defendants, Office Gomez and Sergeant Liesengang, but
2 also to the proposed ACS defendants, Ms. Wright and Ms.
3 Dawson.

4 These ACS employees will be prejudiced because
5 they will take time away from ensuring the well-being of
6 children under the City's care to defend against futile
7 claims.

8 Plaintiff's motion comes at a time when the
9 media and the public have vilified ACS has an
10 organization for their inaction which led to the death of
11 Zymere Perkins and recently, ACS Commission Gladys
12 Carrion said that cases should never slip through the
13 cracks. Zymere Perkins tragic death was a case that
14 slipped through the cracks.

15 But here, we have a case that easily could have
16 but did not slip through the cracks. These ACS employees
17 were proactive. They intervened to make sure that
18 Shaqueena Cook's children were safe and now they're being
19 sued for doing their jobs.

20 As for the NYPD defendants, this case -- and
21 plaintiff agrees, this case began with Darlene Cook's
22 false arrest claim against Officer Gomez. Plaintiff's
23 proposed amendments threatened to make this case more
24 confusing and as plaintiff admits, more complicated,
25 unnecessarily so. The plaintiff's proposed amendments

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1 concerning the ECS employees, have little bearing on the
2 false arrest claim. The NYPD defendants arrested
3 plaintiffs based on their observations at the scene. And
4 Officer Gomez and Sergeant Liesengang are entitled to be
5 judged by the evidence as they knew it.

6 That does not include the more than 300 pages
7 of Shaqueena Cook's ACS records. Without these proposed
8 records against ACS, those records are not relevant.
9 Plaintiffs are trying to bolster their false arrest
10 claims by blending the actions of ACS and NYPD.

11 Plaintiff's attempt to expand this case will
12 result in prejudice to the NYPD defendants because they
13 will be judged not for their actions but for the decision
14 of ACS to remove Shaqueena Cook's children. This
15 prejudice can be avoided if plaintiffs bring a separate
16 action rather than an amendment.

17 Second, plaintiff's new claims are not viable.
18 The plaintiffs are seeking to add five claims, your
19 Honor.

20 THE COURT: Well, let me just go back for a
21 second on that last point, okay? Your argument is that
22 the NYPD officers who acted based upon information
23 provided by ACS will be prejudiced if this is tried as
24 one lawsuit, is that what I am understanding you to say?

25 Aren't what you really saying is what the

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1 plaintiff has said which is maybe this presents a
2 conflict in the sense that you, as corporation counsel,
3 are going to be in a difficult position defending the
4 NYPD who are going to say well, we acted on their say so
5 and, you know, therefore we're innocent of all these
6 charges that you've brought against us and yet at the
7 same time, have to defend the ACS workers?

8 I mean, do we have a situation where we need
9 to bring them all in and make sure that they want to
10 continue to be represented by you, given the potential
11 conflict that I see here?

12 MR. GARCIA: Well, your Honor, that may be the
13 case if these amendments are allowed to go through.
14 That's another reason why the cases should perhaps be
15 separate and plaintiff originally said that the NYPD's
16 equation doesn't change very much but as you pointed out,
17 that's not true. There is a prejudicial effect to the
18 NYPD defendants if the ACS defendants are brought in as
19 well.

20 MS. NELSON: Your Honor, I believe on the
21 proposed amended complaint, rather than a conflict
22 between the ACS workers and NYPD, it's more likely that
23 plaintiff's false arrest claim cannot stand against the
24 NYPD defendants. If it is, by his own admission, that
25 they relied on information by the ACS workers, as they

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1 should have. They had a right to. If that's the case,
2 then there was probable cause to make the arrest and so,
3 it seems that's where the conflict is. It's with whether
4 or not the claims that plaintiff is trying to make can
5 survive.

6 THE COURT: Well, I mean I think that's sort of
7 a different question. That's a motion --

8 MS. NELSON: But --

9 THE COURT: -- a different motion than the one
10 that's before me today.

11 MS. NELSON: I agree.

12 THE COURT: I was just sort of responding to
13 counsel's argument that --

14 MS. NELSON: Right.

15 THE COURT: -- the better road here would be to
16 have two separate lawsuits, basically addressing the same
17 facts which I am a little troubled by but --

18 MS. NELSON: Yes, I --

19 THE COURT: -- I understand your point.

20 MS. NELSON: And I agree, your Honor.

21 THE COURT: That may be an argument later for
22 summary judgment or --

23 MS. NELSON: Or --

24 THE COURT: -- a motion to dismiss or whatever,
25 but I --

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1 MS. NELSON: May I address part of your
2 concern, your Honor, and I think that Mr. Garcia by the
3 time he gets to the end of his presentation, might answer
4 some of your Honor's questions but I believe there is
5 some mischaracterization of the information that is in
6 the ACS records which would lead anyone to believe, based
7 on plaintiff's motion, that the ACS workers did not have
8 the right to an emergency removal.

9 If you remove that equation and you really
10 understand the records, I don't see that there's a
11 conflict. There was a need for an emergency removal.
12 NYPD was called for assistance. When the plaintiffs
13 denied access, however we want to describe denying
14 access, then they were arrested accordingly for OGA, so I
15 think as Mr. Garcia continues, some of your Honor's
16 questions might be answered. If not, we're happy to
17 address it further.

18 THE COURT: Okay. But I think you would have
19 to agree with me that there's a disputed issue of fact
20 here on that the plaintiff is taking the position that
21 there was no emergency reason to remove the children and
22 you're saying that the ACS workers, in fact, did have a
23 reason to remove the children and therefore, their
24 actions were supported, as were the officers who relied
25 on their actions.

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1 But that again, I think we're sort of getting
2 beyond what we have here which is a motion to amend. But
3 maybe you're right.

4 MS. NELSON: But -- right.

5 THE COURT: Maybe as Mr. Garcia goes forward
6 and continues his argument, I'll --

7 MS. NELSON: Right.

8 THE COURT: -- understand better your position.

9 MS. NELSON: And it seems more, your Honor --
10 and just two brief points. It seems your Honor, more
11 that what is being created are issues of fact rather than
12 conflicts amongst the defendants but your Honor, if it
13 will appease your concern, one of the things that we can
14 do in our office is talk to all of the defendants and
15 make sure that they understand any potential concerns
16 your Honor might have and --

17 THE COURT: Yeah, I haven't done this for --

18 MS. NELSON: -- formally --

19 THE COURT: -- I haven't done this for a while.

20 MS. NELSON: -- formally consent to multiple
21 representation.

22 THE COURT: But this is the --

23 MS. NELSON: Exactly.

24 THE COURT: -- Dutton proceeding that --

25 MS. NELSON: Exactly.

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1 THE COURT: -- you know, we've done in other
2 cases --

3 MS. NELSON: Right, and --

4 THE COURT: -- where usually it's officers who
5 have different positions but --

6 MS. NELSON: I completely understand.

7 THE COURT: We'll address that after the issue
8 of the amendment is decided. If there's no amendment,
9 there's no conflict. If there's an amendment, there
10 might be a need for a Dutton hearing, so --

11 MS. NELSON: Understood.

12 THE COURT: Okay. So, I'm sorry. Go ahead,
13 Mr. Garcia.

14 MR. GARCIA: As I was saying, the plaintiffs
15 were seeking to add five claims: failure to intervene
16 against the ACS defendants, fabrication of evidence
17 against both NYPD and ACS defendants, false arrests
18 against the ACS defendants, an unlawful entry claim
19 against the ACS defendants and substantive due process
20 against the ACS defendants.

21 With respect to the new failure to intervene
22 claim, there can be no such claim against the ACS
23 defendants. Only law enforcement officers have a duty to
24 intercede and prevent constitutional violations. The ACS
25 defendants here are not law enforcement officials and

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1 have no duty to intervene and prevent plaintiff's arrest.
2 Thus, this new intervene -- failure to intervene claim
3 fails as a matter of law.

4 Next, the proposed fabrication of evidence
5 claim also fails against both NYPD defendants and the ACS
6 defendants. To state a claim for fabrication of
7 evidence, plaintiffs must show five elements. One, an
8 investigating official fabricated evidence that is likely
9 to influence a jury's decision, forwarded that
10 information to prosecutor and the plaintiff's suffered a
11 deprivation of liberty as a result.

12 First, plaintiffs now allege that the ACS
13 defendants forwarded fabricated evidence to the DA's
14 Office. In fact, the only person who communicated with
15 the District Attorney's Office was Officer Gomez. And
16 even if the ACS employees could be liable for Officer
17 Gomez's actions, this claim fails for the same reasons
18 that it does against Officer Gomez because the alleged
19 fabricated evidence is statements by ACS which would be
20 inadmissible hearsay and would never influence a jury's
21 decision.

22 Likewise, Officer Gomez's statements to the
23 District Attorney's Office are also inadmissible hearsay.
24 Plaintiffs do not allege that the NYPD coerced the
25 confession or planted evidence. Instead, their claim

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1 rests solely on Officer Gomez's statements to the
2 District Attorney's Office. Those statements are
3 inadmissible and would never reach a jury and cannot be
4 the basis for a fabrication of evidence claim.

5 With respect to the new false arrest claim
6 against the ACS defendants, plaintiffs are attempting to
7 impute personal involvement on the ACS defendants. A
8 person cannot be liable for the false arrest of another
9 unless she instigates or procures that person's arrest.
10 Meaning that she fabricated a criminal accusation and
11 induced the police to rely on that accusation.

12 Here, the ACS defendants did not invent a
13 criminal accusation to tell the police. They merely
14 requested NYPD assistance to conduct the emergency
15 removal which is not the same thing as accusing the
16 plaintiffs of committing a crime.

17 Moreover, plaintiff's arrest were based on the
18 observations of the officers on the scene, as opposed to
19 any statements ACS defendants made. Therefore, the ACS
20 defendants did not induce plaintiff's arrest and the
21 proposed false arrest claim is not viable.

22 Darlene Cook's proposed unlawful entry claim
23 also fails. Now, your Honor, this is the third pleading
24 and Darlene Cook has never alleged that anyone entered
25 her apartment, not the NYPD, not ACS. Instead, the

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1 plaintiff's only allege that the NYPD entered the
2 vestibule, an area in which no one has an expectation of
3 privacy because it's a common area.

4 Now, to the extent that plaintiffs now allege
5 that there was an entry, the entry was made with the
6 consent of the nonparty occupants who were inside the
7 home who opened the door after the plaintiffs were
8 arrested.

9 THE COURT: Okay. So, describe the scene to me
10 here. This is a multi-family home.

11 MR. GARCIA: Your Honor, this is Darlene Cook's
12 apartment.

13 THE COURT: Okay. So, it's a multi --

14 MR. GARCIA: She had --

15 THE COURT: -- family building?

16 MR. GARCIA: yes, your Honor.

17 THE COURT: Okay. And on what floor does she
18 live?

19 MR. GARCIA: I believe it was the first floor.

20 THE COURT: Okay. And so, the officers knocked
21 on the door from the outside and entered the -- what
22 you've described as the vestibule. It's like a hallway
23 that is -- leads to multiple apartments or just her
24 apartment?

25 MR. GARCIA: I'm not sure -- quite sure, your

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1 Honor, but I believe that -- actually, your Honor, I am
2 not sure because -- on the facts before I --

3 MR. LOZAR: I could shed some light on that. I
4 mean, obviously the defendants are able to dispute this
5 later if something else comes up, but from what I
6 understand, this all starts on the sidewalk and I think
7 it is a multi-apartment building but this is a single
8 family apartment and it has an entrance directly from the
9 sidewalk.

10 And so, this vestibule that we're talking
11 about, the way it's been described to me by my clients is
12 that it's something akin to if you -- the sort of place
13 where I, you know -- you would put like umbrella -- you
14 like walk in, like a coat -- I don't know if there were
15 coat hooks -- this is how, you know -- umbrellas, and
16 then the next door goes in.

17 And so, that's -- I can answer more questions
18 but that's my general -- that's the very brief
19 description of what I know.

20 THE COURT: Is this the kind of an entryway
21 where obviously you would go through another door to get
22 into the plaintiff's living room or dining room or foyer
23 or something, right? Is that what you're saying?

24 MR. LOZAR: Um.

25 THE COURT: You enter into this area where you

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1 say coats and umbrellas would be stored and then there's
2 yet another locked door into the actual living space of
3 the apartment?

4 MR. LOZAR: Yes, yes. After the second door.
5 So, there's the first sidewalk door, let's say. And then
6 there's the second door. Beyond the second door is the
7 living room.

8 THE COURT: Okay.

9 MR. LOZAR: And I gather it's locked because it
10 seems from, you know, all accounts that the police
11 couldn't just go in. They could not open the door, but
12 -- but, yes.

13 THE COURT: And is there a staircase in this
14 coat area that leads to the second floor?

15 MR. LOZAR: No. But it's my understanding that
16 this is just -- it just goes directly to -- there's no
17 other doors. There's stairs. It's just --

18 THE COURT: Just into Darlene Cook's apartment?

19 MR. LOZAR: Yes, that's my understanding.

20 THE COURT: All right. I just want to get a
21 sense -- go ahead.

22 MR. GARCIA: Yes, your Honor. And as I was
23 saying, the police made entry after the plaintiffs were
24 arrested because the occupants who were still inside the
25 apartment, opened the door for the police.

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1 Lastly, with respect to the substantive due
2 process claim, plaintiff's allegations in the proposed
3 second amended complaint, misstate and mischaracterize
4 the record. The Second Circuit has held that an
5 emergency removal of children may be conducted when there
6 is a risk that the child will be left bereft of care and
7 supervision.

8 Now plaintiffs would have this Court believe
9 that there was no such emergency. Their allegations make
10 it seem as if three ACS workers saw the child and
11 concluded the situation was okay.

12 Now these allegations in the proper context
13 however show that plaintiffs do not have a viable claim.
14 Now, I don't think there is a dispute of fact as to the
15 16 pages of the pertinent ACS records, your Honor. Those
16 were -- I think the facts contained in those records are
17 not in dispute. It's simply that plaintiffs are
18 misquoting and misstating the records to make it appear
19 as if there's no emergency.

20 For example, paragraph 26 of the proposed
21 second amended complaint misquotes the ACS records.
22 Plaintiffs quote in that paragraph is from Darlene Cook's
23 prior history which refers to the birth of Shaqueena
24 Cook's daughter, not the birth of her son.

25 Paragraph 29 misstate CPS worker Dawson's

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1 opinion of the case. She did not say in her records that
2 the children were not in imminent danger. In fact, one
3 of her hypothesis in this case -- would your Honor like a
4 copy of the records?

5 THE COURT: Have they been provided to me in
6 connection with the motion?

7 MR. GARCIA: Yes, your Honor. They were filed
8 as Plaintiff's Exhibit D.

9 THE COURT: Okay. That's fine. I don't need a
10 copy of it but I just want to make sure that it's part of
11 the record before me.

12 MR. GARCIA: Yes, your Honor. And Ms. Dawson's
13 hypothesis can be found on Bates stamp number DEF-0048.
14 One of her hypothesis was that the mother is unstable to
15 care for her two young children and does not have any
16 provisions for the children. The mother does not have a
17 support system.

18 This does not reflect upon the plaintiff's
19 allegation that everything was okay. And then in
20 paragraph 30, your Honor, they cherry-pick the most
21 favorable portions of a home visit and ignore the dire
22 reality that the children were facing. There was an
23 imminent risk to the children's well-being in this case
24 because after giving birth to her son, Shaqueena Cook had
25 no source of income and was in an unstable living

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1 situation. She told the ACS employees that she did not
2 have enough provisions for her children. She only had
3 the limited supplies the hospital gave her which was four
4 bottles of formula and a few Pampers. This for both her
5 newborn and her infant daughter.

6 And so, the ACS defendants promptly concluded
7 that there was a threat upon the children and that they
8 needed to be proactive. And so when I said earlier that
9 this was a case that could have slipped through the
10 cracks, that's exemplified from plaintiff's allegations
11 that if you look at it from plaintiff's point of view,
12 this case could have slipped through the cracks. But
13 upon closer review of the records, your Honor, you'll see
14 that there was the conditions for emergency removal and
15 the ACS workers had to act.

16 And so plaintiffs do not have a viable
17 substantive due process claim and for the foregoing
18 reasons, the Court should deny plaintiff's motion to
19 amend.

20 THE COURT: Was this decision to remove the
21 child done in conjunction with the family court or was
22 this something that the workers determined on their own
23 to do?

24 MR. GARCIA: Your Honor, this was a decision
25 made internally within ACS. That is why it was an

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1 emergency removal. They also sought a petition from the
2 family court as they were simultaneously conducting the
3 emergency removal but they felt they had to move in now
4 before seeking a court order.

5 THE COURT: And --

6 MR. GARCIA: Which they have the right to do
7 under the New York State Social Services and Family Court
8 Act.

9 THE COURT: Right, I know, but you are probably
10 too young to remember this but I am sure your co-counsel
11 does, not to suggest that you're -- but I am sure you
12 recall the Nicholson case in which Judge Weinstein issued
13 a variety of rulings regarding emergency removals and
14 separation of children were there was -- there were
15 issues. And so, having worked on that case for more
16 years than I want to think about, I'm very sensitive to
17 the concerns of when children can properly be removed and
18 so the fact that the mother doesn't have a job is
19 obviously of concern but, you know, there are a lot of
20 young women who have just given birth who don't have
21 jobs, I dare say. And in this instance, it seemed as
22 though she was with family members.

23 So, I don't know -- you know, I guess my
24 question is what's going on here raising a Nicholson
25 issue?

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1 MS. NELSON: Your Honor, I don't believe it is
2 and it's been a while since I dealt with Nicholson but I
3 don't believe you can look at just the fact that she did
4 not have a job as dispositive of this issue.

5 I think the ACS workers looked at the totality
6 of the circumstances. They had all this information from
7 -- information they gathered, information that Shaqueena
8 Cook told them and I believe they had the right to take
9 that seriously, whether or not it turns out that she did
10 have a support system, they have the right to rely on
11 what she says to make a determination as to whether or
12 not the children should be removed immediately because of
13 the circumstances.

14 And, Mr. Garcia can speak to -- your Honor,
15 rather than misstating this, may I just have a minute
16 with Mr. Garcia?

17 THE COURT: Absolutely.
18 (Counsel confer)

19 MR. GARCIA: So, yes, your Honor, even though
20 as you mentioned, Ms. Cook was with some family members
21 at the time, the family as a whole did not have enough
22 resources for their -- for all the children, as well,
23 that were in the household at the time.

24 Ms. Cook specifically only had the limited
25 supplies that the hospital gave her and as I said,

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1 Shaqueena Cook only had the supplies for her children and
2 the situation she was in was an unstable one. She was
3 not in the same apartment as Darlene Cook. Remember, she
4 had her own separate unit that she was sharing with some
5 family members, which I believe was also Department of
6 Homeland Services Housing and I think they were even
7 being evicted or in the process of being evicted. I'm
8 not quite sure on that.

9 But that's why ACS felt there was an unstable
10 living situation. The family members, as a whole, did
11 not have enough provisions for all of the children in the
12 household and Shaqueena Cook specifically told her --
13 told the ACS workers that she did not have enough
14 provisions for her children.

15 THE COURT: Okay. So, I interrupted your
16 argument. I don't know if there were any other points
17 that you wanted to make at this time before I turn it
18 back to plaintiff to respond to anything he wants to
19 respond to. Are you done?

20 MR. GARCIA: Yes, your Honor.

21 THE COURT: Okay.

22 MR. GARCIA: That's it.

23 THE COURT: All right. Great.

24 Counsel, is there anything you would like to
25 respond to? Do you have a position on -- I don't know if

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1 you're familiar with Nicholson or not but the issue that
2 I am talking about which is --

3 MR. LOZAR: Well -- excuse me. So, I think
4 that -- I haven't read Nicholson. I think that probably
5 I read some of the cases that Nicholson decided. Your
6 Honor was alluding to these Second Circuit cases before
7 but, you know it is impression from this conversation
8 that it's our position that an issue fact exists as to
9 this. There are some very positive reports during those
10 nine pages that are in this period where the emergency
11 circumstances were found to exist.

12 And, you know, again I don't think it's
13 plaintiff's burden to prove that like this was a Leave It
14 To Beaver household. I think that the emergency
15 circumstances questioned its -- you know, at that moment,
16 there was a reasonable time -- there was a reasonable
17 period of time consistent, unlike now, like where's like
18 a quote -- but anyway, a reasonable time consistent with
19 the safety of the child to obtain a judicial order and if
20 there was, the emergency removal was unwarranted. And I
21 think that this is --

22 THE COURT: Well, did your client tell ACS that
23 she didn't have enough provisions to feed her children?

24 MR. LOZAR: Well, I will say two things about
25 that. Number one, I think that she said -- I forget what

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1 the exact language is, you know, I don't have to read it
2 into the record but it's something to that effect, right,
3 you know, that's -- I have these -- this number of
4 bottles of milk, right? I'm not quite sure exactly like
5 how it was posed.

6 But I will also mention that the Social
7 Services Law that -- these representatives who come to
8 the house, they frequently assist families in obtaining
9 supplies for (indiscernible). And that's actually part
10 of the story.

11 I mean, Ms. Wright and Shaqueena Cook had this
12 experience with ACS in the past. She said, I'm going to
13 come and bring you some diapers and so, in talking to
14 these people, you know, in a way, describing what your
15 needs are is a way to have your needs met. And I think
16 that that is a large part of what is happening here.

17 THE COURT: So, you think what was going on was
18 she telling them can you bring me some additional formula
19 and diapers and things of that sort, that that's why she
20 was saying I'm running out.

21 MR. LOZAR: That is what I think. I mean,
22 further discovery will shed some light on that. She was
23 living with her sister at the time. You know, the fact
24 that she has a -- when she invited Ms. Wright to come to
25 deliver the diapers, you know, this is because the

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1 matriarch of the family had died the previous day and she
2 said, you know, I am going to be with the family at 97-20
3 and there are like 15 to 20 family members there and, you
4 know, whether or not those people would be able to
5 support her in some material way with diapers or milk, I
6 don't know but it's not a situation that like so clearly
7 is the emergency that -- the way that, you know
8 -- it can only be spun as an emergency --

9 THE COURT: Okay.

10 MR. LOZAR: -- is my best position.

11 THE COURT: Do you have any other arguments
12 that you would like to address that defendant's counsel
13 raised on the various claims that you seek to add? I
14 don't know if there's anything that he said that you
15 wanted to respond to directly?

16 MR. LOZAR: Well, you know, I will say -- you
17 know, I don't want to just say things to, you know, to
18 defense by myself but, I mean, if you have particular
19 questions I am happy to answer them.

20 I do think it's an interesting question about
21 -- so the fabrication of evidence, for instance, like
22 that's something that I thought about or the false arrest
23 for that matter. And the fact that the ACS defendants
24 are being brought in or requesting to be brought in,
25 particularly like the word forwarding, right, in the

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1 context of the fabrication of evidence. It is certainly
2 true that, you know, at some point there is one person
3 who hit the fax button send and so, I thought about, you
4 know, what does the word forwarding mean? Does it mean
5 that only one individual can ever be liable for a
6 violation of fabrication of evidence?

7 And I don't think that that's true. I think
8 that's, you know, Sergeant Liesengang for one example, I
9 think there's some dispute about that as well. He was
10 the supervisor on the scene. He actually is like signing
11 off on all the reports, knowing full-well that they are
12 going to be sent to the District Attorney's Office and
13 that this is going --

14 Anyhow, I think that like the way that these
15 words are interpreted they are interpreted in a way that
16 does like encompass someone beyond a person who pushes
17 the fax button.

18 With respect to the ACS defendants, the way I
19 am looking at this is that from the starting premise,
20 that there -- they could not have reasonably thought that
21 these were emergency circumstances. That's our starting
22 premise, right?

23 And yes, they did not actually arrest the Cooks
24 and yes, they did not actually push the fax button but I
25 think that they knowing -- it's our position that there

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1 were no emergency circumstances, they invoked the police
2 power and like come with us, right? And so there is this
3 agency on the part of these ACS defendants that brings
4 them into the purview of these constitutional violations.

5 Yes, I think that -- and obviously, we're doing
6 the Section 1983 actions and so, you know, this is under
7 color of state law, right? And so it's not the instance
8 of like a private party communicating false statements to
9 the police.

10 Actually, it's a very interesting area of the
11 law. I mean, it's -- of all things, I thought that if
12 the Court were to ask for supplemental briefing, this is
13 something that, you know, is not totally obvious, right.
14 And there is lots of case law out there that I've seen
15 that's, you know, of interest in this respect.

16 THE COURT: All right. Well, I will take all
17 of this under advisement, review the briefs in light of
18 the arguments today and I will issue an order shortly.
19 Okay? Thank you very much.

20 MS. NELSON: Thank you, your Honor.

21 MR. GARCIA: Thank you, your Honor.

22 (Matter concluded)

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24

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 10th day of November, 2016.


Linda Ferrara

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